87-881

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLARD DONALD GROSS

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

APPENDIX

OF PETITIONER

WILLARD DONALD GROSS
6718 RUSSELL CAVE ROAD
LEXINGTON, KY. 40511
606/2996109

PRO SE PETITIONER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CR. NO. 82-34

UNITED STATES OF AMERICA PLAINTIFF

V. ORDER

WILLARD DONALD GROSS DEFENDANT

On June 25, 1986, and July 10. 1986, Magistrate James F. Cook conducted a evidentiary hearing which addressed defendant Willard Donald Gross' motion to vacate. The Perimeters of this hearing were established by the mandate of the Sixth Circuit Court of Appeals in its order of May 15, 1986. Rejecting several of the grounds asserted by the defendant the Court of Appeals directed:

> The appellant also alleges ineffective assistance filing a reply to the United States' response to the February 8, 1985. While counsel is not required to relief in his memorandum in support of the motion to vacate. The appellant alleges ineffective assistance because his attorney failed to file a motion for reduction of sentence within the 120 day period required by Federal Rules of Criminal Procedure 35 (b). The motion to vacate sentence should therefore be remanded to the district court for consideration of the appellant's claim of ineffective assistance of counsel for failure to file a timely motion for reduction of sentence pursuant to Federal Rules of Criminal Procedure 35 (b). In the event the district court finds that this does constitute ineff-

> ective assistance of counsel, the appellant should be allowed to amend his motion to vacate to include the claims of the Rule 35 motion.

(Record #318.) Thus the evidentiary hearing was over the narrow issue of whether the failure of the defendant's second attorney to reply to the United States' response to the original motion to vacate and to file a timely Rule 35 motion rose to the level of a denial of effective assistance of counsel. The standard for judging whether there has been ineffectiveness of constitutional dimensions is that set forth in Strickland V. Washington. 466 U.S. 668 (1984). This standard was used as the touchstone by whcih the magistrate made his findings of fact and recommendations.

The Magistrate found that the conduct of the defendant's second attorney Blake Page did not constitute ineffective assistance of counsel with regard to the matter of not filing a reply to the United States' response to his motion to vacate sentence nor by the failure to file a timely Rule 35 (b) motion. Therefore the Magistrate recommended that the defendant not be allowed to amend his motion to vacate to include the claims of the

Rule 35 motion and that his motion to vacate be overruled.

The defendant has filed objections to the Magistrate's Proposed Findings of Fact and Recommendation. These objections tend to be conclusory and offer no additional facts nor law. Basically the objections can be divided into two categories--those that relate to the conduct of the evidentiary hearing and those that take issue with the Magistrate's findings.

In regard to the first category Mr. Gross complains that he had insufficient time to prepare his presentation, that he was not allowed proper witnesses, that he was not permitted enough exhibits, and that the Magistrate tried to coerce him by browbeating him into presenting witnesses.

The transcripts of the June 25 and July 10, 1986, evidentiary hearings indicate that the circumstances of both hearings were fair, impartial, and judicious. Gross indicated that he had not been given adequate notice of the June 25 hearing, so, in response to Gross' request, a further hearing was set and held two weeks later on July 10. Gross himself stated, "I would like to have...

the two weeks would be fine to prepare." (Record #331, Transcript of June 25, 1986, hearing at 32,)

At the June 25 hearing Mr. Gross also noted the he had requested that eighteen witnesses be subpoened to appear at his evidentiary hearing. The Magistrate went through the list one by one with the defendant asking why each needed to be summoned. Id. at 12-20. It was evident from this procedure that Gross hoped for a "full evidentiary hearing" essentially a retrial of his criminal case, and these witnesses were relevant only to that broad purpose. Only Gross' second attorney Blake Page, was relevant to the narrow scope of the contemplated hearing as directed by the Court of Appeals. Typical of this roll call of possible witness was the following exchange:

> MAGISTRATE COCK: Your next one is Gary Wilson of Lexington, Kentucky. Who is he and what connection would he have?
> DEFENDANT GROSS: No connection unless I have a full evidentiary hearing.

Id. at 19-20.

Gross' complaint in regard to his exhibits is unfathomable since Gross was permitted to file all of the exhibits that he requested. (Record # 338, Transcript of July 10, 1986, hearing at 10-

16, 18-19.)

The browbeating of which Gross complains was apparently the following incident:

> MAGISTRATE COOK: Very well. What witnesses do you intend to call, Mr. Gross?
>
> Mr. Gross: At this time, I don't intend to call any, your honor.
>
> MAGISTRATE COCK: Well, you're going to lose on your motion then because you have the burden of proof.

Id. at 6. Gross then introduced his evidence and spoke in regard to the issue before the Magistrate as well as about the lack of proper notice for the June 25 hearing. The Magistrate then stated:

> I doubt that Mr. Gross' presentation has shifted any burden to the United States, but having noticed that Mr. Page is here, present I think it would be well if he were called as a witness,and if the United States doesn't wish to call him, the Court will, and I'll do that at this time and ask that you examine Mr. Page on direct examination and then Mr. Gross may corss examine him.

Id. at 18. It is difficult to see how the assumption that Gross had shifted the burden to the United States in any way harmed Gross' presentation.

In regard to the second category of complaints--that the Magistrate's findings and recommendation were incorrect--the Record also supports a different conclusion. Mr. Page knew when the 120

period for filing a Rule 35 motion began to run but felt he was making a good faith challenge to the court's assertion of lack of jurisdiction. As Page explained at the July 10, 1986, evidentiary hearing:

> From the academic point of view, I'm not too sure that Mr. Gross still doesn't have a chance at the Rule 35 since we are in the Circuit Court (sic) right now, because that's the only opinion they ever give for not granting it, is that they lose the jurisdiction.

(Record #338, Transcript of July 10, 1986, hearing, at 27-28.) In addition since a Rule 35 plea for leniency is discretionary no Sixth Amendment right to counsel attaches.

Mr. Page's failure to file a reply to the United States' response to his motion to vacate was also a concious strategy decision. As he stated at the evidentiary hearing:

> The proper office that I've always followed when there is no evidentiary hearing and the United States answers only on the law I have my cases that I'm going to argue in the Sixth Circuit. And, those appear in my brief when I get there and in my oral argument. They don't get exhausted down here.

Id. at 30.

Nor was Mr. Page's failure to act in regard to the reply or the Rule 35 motion the result of

any external circumstances. Although Page had surgery in March of 1985, he "kept track" of what was going on at his office "and this thing (the Rule 35 motiom) wasn't ripe at that time ...." Id. at 29. When asked whether his failure to file a reply to the government's response to the motion to vacate was in any way due to his surgery, he responded: "I think that the failure to file the response was that I didn't need it, and that it would be--was going to be appealed into the--back to the Sixth Circuit." Id. at 31.

The Court being sufficiently advised, IT IS ORDERED THAT:

(1) The Magistrate's proposed Findings of Fact and Recommendation is adopted as the opinion of this Court;

(2) That in conformity with those recommendations, this Court finds that the defendant was not rendered ineffective assistance of Counsel by Attorney Blake Page with regard to the matter of not filing a reply to the United States' response to his motion to vacate sentence nor by the failure to file a timely Rule 35 motion;

(3) That further in conformity with those recommendations the defendant may not amend his motion to vacate to include the claims of the Rule 35 motion;

(4) That still further in convormity with those recommendations the defendant's motion to vacate is OVERRULED;

(5) That the defendant's motion to expedite (Record #346) is OVERRULED as moot.

This 3rd day of December, 1986.

HENRY R. WILHOIT, JR., Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CR. NO. 82-34

UNITED STATES OF AMERICA PLAINTIFF

V. ORDER

WILLARD DONALD GROSS DEFENDANT

The record reflects that on September 3, 1986, the defendant, pro se, filed a Motion pursuant to Rule 35(a) for Vacation (Record #336), which this court contrues as another in a series of motions for reduction of sentence impcsed on July 26, 1983. On February 8, 1985, the defendant a motion to Vacate sentence (Record #264); on August 21, 1985, he filed a Motion to Vacate under 28:2255 (Record #292); on September 26, 1985 a Motion for Reduction or Modification of Sentence Pursuant to Rule 35 (A&B) and for Relief Pursuant to Rule 32(c) (Record #294); On October 16, 1985, a Supplemental Motion (Re: 2255 Motion) (Record #303), on October 29, 1985, a Motion for Reconsideration (Re: Ruling on 2255 M tion) (Record # 308).

At present there are three motions still pending from the defendant--in addition to the

Rule 35(a) Motion. There is also a Motion to File Exhibits in Support of the Rule 35(a) Motion (Record #337), AMotion for an Order to Produce Grand Jury Testimony (Record #345), and a Motion to Expedite Hearing (Re: Rule 35 Motion) (Record #347). Each of the motions prior to the most recent Rule 35(a) Motion was carefully considered and ruled upon. Indeed, it should be noted that the defendant has already filed a motion under Rule 35(a) and that motion was denied on the basis of its merits. (Record #306).

Although the case is in the context of 28 U.S.C. Sec. 1915 (d) the defendant's attention is directed to Green V. Wilson, 517 F. Supp. 332 (E.D. Ky.. 1981), for the attitude of courts in this district toward "a plethora of frivolous, repetitive (motions)." Defendant has now asked the same question in approximatelt five different ways and received the same answer each time. This court reiterates the observation of the court in Green, "(n)o one, rich or poor, is entitled to abuse the judicial process. (Citation omitted.) But (defendant) apparently has an insatiable desire to try," 517 F. Supp. at 336. See

also Grahan V. Riddle, 554 F.2d 133 (4th Cir 1977).

As the United States Supreme Court declared in United States V. Addonizio, 442 U.S. 178, 188-89 (1978):

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commissionis in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges. ...And once a sentence has been imposed, the trial judge's authority to modify it is also circumscribed. Federal Rule Crim. Proc. 35 now authorizes district courts to reduce a sentence within 120 days after it is imposed or after it has been affirmed on appeal. The time period, however, is jurisdictional and may not be extended.

This court has alreade determined that Gross' sentence was not illegal. The 120 day peroud has long since passed. This court no longer has jurisdiction to alter, reduce, vacate, or correct that sentence.

The Court, being sufficiently advised, IT IS HEREIN ORDERED THAT:

(1) Defendant's Motion Pursuant to Rule 35(A) is DENIED;

(2) Defendant's Motion to File Exhibits is DENIED;

(3) Defendant's Motion for Order to Produce Grand Jury Testimony is DENIED;

(4) Defendant's Motion to Expedite is DENIED;

(5) The Clerk is now directed to refuse to accept any addidtional pleadings from the defend ant that attack the validity of the defendant's sentence or pertain to any issue that has previously been desposed of by the Court. Any such Pleadings or motions shall not be filed and shall be returned to the defendant.

This 12 day of December, 1986.

HENRY R. WILHOIT, JR., Judge

Nos. 86-6286
87-5092

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE	)	
V.	)	O R D E R
WILLARD DONALD GROSS, DEFENDANT-APPELLANT	)	

BEFORE: GUY and BOGGS, Circuit judges; and SUHRHEINRICH, District Judge.*

This case had been referred to a panel of the court pursuant to Rule 9 (a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34 (a), Federal Rules of Appellate Procedure.

Defendant was convicted by a jury of conspiracy and counterfeiting charges in Federal District Court for the Eastern District of Kentucky. Defendant was sentenced to consecutive terms of five years imprisonment at the Federal

*The Honorable Richard F. Suhrheinrich, U.S. District judge for the Eastern District of Michigan, sitting by designation.

Correctional Institution in Lexington and $2,500.00 on the conspiracy count and thirty months imprisonment and $2,500.00 on the counterfeiting count. This court affirmed defendant's conviction and mandate issued anuary 15, 1985.

Defendant, through counsel, filed a motion to vacate pursuant to 28 U.S.C. Sec. 2255, which was denied. Defendant fired his retained counsel and subsequently filed a second motion to vacate and untimely motion for reduction of sentence under Fed. R. Crim. P. 35(b).

These motions were denied and this court affirmed the denial of the motion to vacate as sucessive on three grounds. However, this court remanded the motion to the District Court to determine whether the defendant had a claim for ineffective assistance of counsel because his retained counsel failed to file a timely Rule 35(b) motion. A magistrate held and evidentiary hearing and determined that defendant was not rendered ineffective assistance of counsel. The district court adopted the magistrate's findings and overruled defendant's motion to vacate. Defendappealed in case number 86-6286 and we hereby

affirm for the reasons set forth in the district court opinion. Rule 9(b)(5), Rules of the Sixth Circuit.

During this same period of time, defendant filed another Rule 35(b) motion which was denied on December 15, 1986. Defendant appealed this order on January 22, 1987 in case number 87-5092. Fed. R. App. P. 4(b) requires that an appeal from an order in a criminal case be taken within ten days of the entry of that order. Although this appeal period can be tolled pending a decision on a timely motion for arrest of judgment under Fed. R. Crim. P. 34 or a motion for a new trial under Fed. R. Crim. P. 33, the motions defendant tendered during the appeal period did not resemble in any way a motion for new trial not a motion for arrest of judgment. Therefore, because defendant did not request nor receive an extension of time, his appeal from the district court order entered on December 15, 1986 was untimely and must be dismissed pursuant to Rule 9 (b)(1), Rules of the Sixth Circuit.

According, in case number 86-6286 we here-

by affirm, Rule 9 (b)(5), Rules of the Sixth Circuit, and in case number 87-5092, we hereby dismiss for lack of jurisdiction. Rule 9(b)91), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

CLERK

ISSUED AS MANDATE: 9/15/87